IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1191 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MANSING CHATURBHAI VASAVA - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
1.MS RV ACHARYA WITH MS SHAHIN PATHAN for Appellant(s) : 1,
MR KP RAWAL, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 26/02/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE BANKIM.N.MEHTA)

1. The appellant has preferred this appeal

under Section 374 (2) of the Code of Criminal Procedure, 1973 and challenged the judgment and order dated 22-10-1999 passed by the learned Addl. Sessions Judge, Vadodara in Sessions Case No. 92 of 1999, convicting him for the offence punishable under Section 307 of the I.P. Code and sentencing him to undergo life imprisonment and to pay fine of Rs.250/-, in default, to undergo simple imprisonment of 15 days, for the offence punishable under Section 302 of the I.P. Code and sentencing him to undergo life imprisonment and to pay fine of Rs.250/-, in default, to undergo simple imprisonment of 15 days and for the offence punishable under Section 201 of the I.P. Code and sentencing him to undergo rigorous imprisonment of 5 years and to pay fine of Rs.250/-, in default, to undergo simple imprisonment of 15 days. The appellant is given benefit of set off for the sentence for the offence punishable u/s 201 of the I.P. Code. All the sentences are ordered to run concurrently.

2. In brief, the prosecution case was that the accused, his wife Kailashben, two daughters; Sangita aged about 12 years, Jayshri aged about 10 years and son Gautam aged about 8 years were residing at village Sejpura. Before about two years of the incident Kailashben ran away with

one Chandrakant Balubhai Patel of the village leaving the minor children. However, after persuasion by the villagers Kailashben returned to the house of accused and the accused accepted his wife Kailashben as the children were minor and also told her not to repeat such mistake in future. Kailashben was frequently going to the house of Sonaben Somabhai, Ramanbhai Amarasingh and Ravjibhai Chaturbhai residing in the same 'falia' despite objection by the accused. Kailashben was refusing to do any work assigned to her and therefore the accused had to do the work himself. The accused doubted fidelity of Kailashben and despite his objection she used to visit others in the village. On account of this, there were disputes between the accused and his wife Kailashben. On 31-5-1998, Jayshri, the daughter of the accused went to village Rajli. The accused, his wife Kailashben and son Gautam were sitting after finishing their meal at about 8-00 p.m. At that time, Kailashben told the accused to permit her to go to see movie on Television in the village but the accused refused to permit her to go to see the movie. Despite that Kailashben went to village to see movie on Television. Therefore, the appellant spread the mattress on the cot outside the house. Gautam and Sangita slept on the cot and the accused waited for his wife

with an axe. At about 12-30 at night Kailashben returned home. There were quarrels between the accused and his wife with regard to seeing movie on TV. Kailashben insisted and told the appellant that she would go to see movie and she would take away children with her if the accused objected to that. Thereupon, the accused gave 2 to 3 axe blows on the head of Kailashben. On account of shouts raised by Kailashben, the neighbours; Lavghanbhai, Bhikhiben, Jashiben, Sonaben, Champaben etc. came running there and took Kailashben with them and Sangita who was sleeping, got up and went with Kailashben but Gautam remained sleeping on the cot. After some time, the accused inflicted axe blow on the head of his son Gautam who fell unconscious, so he took him to the compound behind his house and gave axe blows on his head and neck as he was alive, thereafter buried him in the pit which was prepared on the previous day. After some time, Sangita returned home and came to the compound of the house. The accused gave one axe blow on her head and another blow on her neck. On account of that Sangita died and she was also buried there and the accused remained at home. Thereafter, at about 7-00 a.m. the accused went to sim of the village with axe. At about 8-00 a.m. the elder brother of the accused and Shanabhai Purshotam came to the accused and

inquired about Gautam and Sangita. The accused narrated the incident to them. So, Fatehsinh took away the axe from him and thereafter the accused went to the police station to give information about the incident.

3. On the basis of the information given by the accused himself offence was registered as I. CR No. 163 of 1998 at Dabhoi Police Station and investigation was started. During the course of the investigation, statement of the witnesses were recorded and inquest pachanama, panchanama of scene of offence and panchanama of recovery of muddamal articles were drawn. Dead bodies of Sangita and Gautam were exhumed and sent for postmortem and the accused was arrested.

4. On completion of the investigation, charge sheet was laid before the Court of the learned Judicial Magistrate, First Class, Dabhoi, Dist. Vadodara for the offence punishable under Sections 302, 307 and 201 of the I.P. Code. As the offence was exclusively triable by the Court of Sessions, the case was committed to the Sessions Court, Vadodara and it was registered as Sessions Case No. 92 of 1998. The learned Addl. Sessions Judge, Vadodara framed charge Exh. 4 against the accused for the offences punishable section 302, 307 and 201 of the

I.P. Code. The charge was read over and explained to the accused who pleaded not guilty to the charge and claimed to be tried. Therefore, the prosecution adduced evidence to prove the charge levelled against the accused. On completion of recording of evidence by prosecution the learned trial Judge explained to the accused the incriminating circumstances appearing against him in the evidence. In his further statement recorded u/s 313 of the Code of Criminal Procedure, 1973 the accused denied having the committed the offence and stated that he has been falsely implicated in the offence.

5. After hearing the learned A.P.P. for the State and the learned advocate for the accused, the learned trial Judge found the appellant guilty for the offence punishable under Sections 302, 307 and 201 of the I.P. Code and sentenced him to undergo the sentences as mentioned hereinabove. Being aggrieved and dissatisfied by the impugned judgment, the appellant has preferred the present appeal.

6. We have heard the learned advocate Ms. R. V. Acharya for the appellant and Mr. K.P. Rawal, learned A.P.P. for the State at length and in great detail. We have also perused the judgment of the trial court as well as the record and

proceedings of the case.

7. Learned advocate Ms. R.V. Acharya appearing with Ms. Shahin Pathan for the appellant submitted that the witnesses have turned hostile and except the medical evidence and the evidence of the police officer, no one has supported the prosecution case. The nexus between the muddamal weapon and the accused is not established, and therefore, the learned trial Judge has committed error in convicting the appellant. Hence, the appeal is required to be allowed and the appellant is required to be acquitted of the charged levelled against him. In support of her arguments, she has relied on the decisions in the case of Aghnoo Nagesia V. State of Bihar, reported in AIR 1966 SC 119 and Bheru Singh s/o Kalyan Singh V. State of Rajasthan, reported in 1994 SCC (Cri.) 555.

8. While opposing the appeal, the learned A.P.P. Mr. Rawal submitted that there is no law that the evidence of Investigating Officer cannot be relied on more particularly when all the witnesses have turned hostile. Therefore, the learned trial Judge was justified in relying upon the evidence of the Investigating Officer. Under the circumstances, the learned trial Judge was justified in convicting the appellant for the

offence charged against him and no interference is warranted in the impugned judgment.

9. In order to prove that the death of deceased Sangita and Gautam were homicidal in nature, the prosecution examined P.W. 2 Dr. Rahulsing Surendrapratapsingh, Medical Officer who performed autopsy of dead bodies of Sangita and Gautam at Exh.11. According to the doctor, external injuries found on the body of Sangita were recorded in autopsy report Exh. 12 and such injuries were possible by muddamal article axe. The witness also deposed that such injuries were sufficient in the ordinary course of nature to cause death and the cause of death was shock due to haemorrhage.

10. The witness also deposed that the injuries found on the dead body of Gautam were recorded in autopsy report Exh. 13 and such injuries were possible by muddamal axe and were sufficient in the ordinary course of nature to cause death. According to the doctor, the cause of death was shock due to haemorrhage.

11. The autopsy reports of Sangita and Gautam indicate the external as well as internal injuries found on the dead bodies. It is not defence that the injuries were either accidental

or suicidal. Therefore, in view of this evidence, the prosecution proved beyond reasonable doubt that death of both Sangita and Gautam was homicidal in nature. However, there is no evidence to connect the appellant with the injuries found on the dead bodies.

12. In order to prove guilt of the accused, the prosecution examined injured P.W. 5 Kailashben Mansing at Exh. 17 who was allegedly injured in assault by the appellant. However, the witness has not supported the prosecution case and was treated as hostile to the prosecution and cross-examined by the learned Addl. Public Prosecutor. From her cross-examination, the prosecution has not been able to elicit that the witness was injured on account of assault by the appellant. The prosecution examined Investigating Officer P.W. 11 Pratapsinh Rathod at Exh. 24 to prove the contradictions. According to the Investigating Officer the appellant disclosed the commission of the offence before him and he recorded the F.I.R. and started investigation. The witness deposed about the statement made by Kailashben. However, considering the overall evidence it would be unsafe to rely upon the sole evidence of Investigating Officer to connect the appellant with the offence.

13. The prosecution examined P.W. 1 Dr. Subhashchandra Jayantilal Shah who examined injured Kailashben, at Exh. 7. According to the witness, the injuries found on the person of Kailashben were recorded in certificate Exh.8 and such injuries were possible by hard and blunt object like blunt portion of axe. The Doctor also opined that such injuries were possible by stick. The prosecution case is that the appellant caused the injuries by axe. Therefore, the medical evidence is inconsistent with the prosecution case.

14. The prosecution produced medical certificate at Exh.8 which indicates the injuries allegedly sustained by Kailashben. In view of the fact that injured Kailashben has denied that she sustained injuries on account of assault by the appellant and the medical evidence indicates that the injuries were possible by blunt portion of axe which is contrary to the prosecution case, in our view, it is difficult to believe that injuries sustained by Kailashben were caused by the appellant.

15. In view of above evidence, in our view, the learned trial Judge committed error in convicting the appellant for the offence

punishable u/s 307 of the I.P. Code.

16. The prosecution examined the panch witnesses with regard to the panchanama of scene of offence, panchanama of arrest of the appellant, inquest panchanama and panchanama of seizure of the muddamal axe. However, the panchas have not supported the prosecution case. Investigating Officer P.W. 11 Pratapsinh admitted that all the panchanamas were drawn in presence of same panchas and he did not make efforts for independent panchas. The panchanama of scene of offence Exh. 26 was drawn between 16-15 and 18-15 hours, arrest panchanama Exh. 27 was drawn between 18-30 and 19-15 hours, panchanama of recovery of hoe Exh. 28 between 20-15 hours and 20-30 hours, panchanama of recovery of spade Exh. 29 between 20-35 hours and 21-00 hours, panchanama of muddamal axe Exh.30 between 19-25 and 20-00 hours, panchanama of cloths of deceased between 21-00 hours and 21-45 hours on 31-5-1998. It is very strange that all these panchanamas have been drawn in such time on the same day. Therefore, in our view the panchanamas cannot be relied upon to connect the appellant with the offence.

17. It is also the case of the prosecution that the accused made extra judicial confession before P.W. 16 Fatehsinh, P.W. 8 Jasoda, P.W. 9

Manubhai and P.W. 10 Lavghanbhai but the witnesses have not supported the prosecution case in that regard. The prosecution also examined P.W. 7 Bhikhiben Lavghanbhai Exh.19, P.W. 8 Jashodaben @ Jashiben Ramanbhai Exh.20, P.W. 9 Manubhai Chitabhai Vasava Exh. 22, P.W. 10 Lavganbhai Z. Vasava Exh. 23. However, the witnesses have not supported the prosecution case.

18. In view of the fact that none of the witnesses has supported the prosecution case, the only evidence supporting the prosecution case, is the evidence of Investigating Officer P.W. 11 Pratapsinh Vadvaji Rathod Exh. 24. The witness carried out the investigation with regard to the offence. According to the witness, the appellant disclosed the fact of commission of offence and it was recorded in the form of F.I.R. Exh. 25.

19. In decision of **Aghnoo Nagesia V. State of Bihar, reported in AIR 1966 SC 119**, the Supreme Court has held as under

> **“The first information report recorded under Section 154 Criminal P.C.. as such is not substantive evidence, but may be used to corroborate the informant under Section 157 of the Evidence Act on to contradict him under Section 145 of the Act, if the informant is called**

> **as a witness. Where the accused himself gives the first information the fact of his giving the information is admissible against him as evidence of his conduct under S. 8 of the Evidence Act. If the information is non-confessional, it is admissible against the accused as an admission under S. 21 of the Evidence Act and is relevant. But a confessional first information report by the accused to a police officer cannot be used against him in view of S. 25 of the Evidence Act.**

In the present case, F.I.R. lodged by the appellant is confessional information. In view of above settled principle, the F.I.R. is not admissible in evidence.

20. Learned advocate for the appellant has also relied on the decision of the Supreme Court **Bheru Singh s/o Kalyan Singh V. State of Rajasthan, reported in 1994 SCC (Cri.) 555**, the F.I.R. wherein the Apex Court has held as under:

> **"When confessional F.I.R. is lodged by the accused himself, confessional part is not admissible in the evidence except to the extent permissible under Section 27.**

In view of above decision, the F.I.R. filed by the accused in the instant case cannot be used

against appellant.

21. The prosecution examined Investigating Officer P.W. 11 Pratapsinh Vadavaji Rathod examined at Exh.24. The witness proved the contradictions in the statement of the witnesses recorded by him. The witness has drawn panchanama of arrest of the appellant, panchanama of scene of offence, panchanama of seizure of muddamal axe and panchanama of clothes of deceased and the appellant. However, it is significant that the clothes of accused though allegedly bearing blood stain marks were not sent to F.S.L. for examination. Similarly, panchanama Exh.30 indicates that muddamal article axe was produced by P.W. 6 Fatehsinh Exh. 18 who had allegedly taken the same from the appellant. However, P.W. 6 Fatehsinh has not supported the prosecution case about taking the axe from the appellant. Therefore, there is no evidence to connect the appellant with the muddamal axe. The panchanama Exh. 27 indicates that cloths like Bush-shirt, trouser and undergarment of the appellant with blood stain marks were recovered and sent to F.S.L. for examination. The medical certificate Exh. 10 indicates that the appellant was also having injuries and was treated at the hospital on 31-5-1998. The Investigating Officer has not collected blood

sample of the appellant. The F.S.L. report does not indicate that blood marks belonging to blood group of the deceased was found on the cloths of the appellant. As the Investigating Officer did not take blood sample of the appellant, possibility of blood marks of the appellant on the clothes cannot be ruled out. Therefore, there is no evidence to connect the appellant with the offence.

22. In view of above, except the evidence of the Investigating Officer there is no independent, cogent and reliable evidence to connect the appellant with the offence. Even the injured witness who is the wife of the appellant and mother of the deceased children has not supported the prosecution case. The prosecution case indicates that there were disputes between the appellant and his wife injured Kailashben. Therefore, there was no reason for injured Kailashben to shield the appellant from the offence more so when her two children were done to death. The injured was the solitary eye witness to the incident but has not supported the prosecution case with regard to her injuries. The neighbours who allegedly came at the place of incident did not witness the incident but came after it was over. As regards death of children; Sangita and Gautam there is

no evidence to connect the appellant in any way with the offence. There is also no evidence to indicate that it was only the appellant who committed the offence and buried the dead bodies of Sangita and Gautam in the pit of compound of the house. It is also strange that according to the prosecution the pit was dug on the previous day by borrowing the spade from the neighbours. In our view, this evidence does not inspire confidence. There is no other circumstantial evidence to connect the appellant in the offence. Considering the fact that P.W. 5 Kailashben was in habit of moving freely in the village, even late at night and also considering her conduct in eloping with a villager leaving behind her minor children resulting into quarrels between them, possibility of false involvement of the appellant, cannot be ruled out. Therefore, in our view, the prosecution has miserably failed to prove that the appellant was involved in the offence. Under the circumstances, in our opinion, the learned trial Judge committed error in convicting the appellant for the offence punishable u/s , 307, 302 and 201 of the I.P. Code and hence the appeal is required to be allowed and the appellant is required to be acquitted of the charge levelled against him.

23. For the reasons recorded in the judgment, the present appeal is allowed and the judgment and order of conviction dated 22.10.1999 passed by the learned Additional Sessions Judge, Vadodara in Sessions Case No. 92 of 1999 is set aside and present appellant – Mansing Chaturbhai Vasava is acquitted of the offence punishable u/s 302, 307 and 201 of the I.P Code by giving him benefit of doubt and he is ordered to be set free forthwith, if he is not required in any other offence. The fine, if paid, be returned to the appellant.

(A.L. Dave, J.)

(Bankim N. Mehta, J.)

/JVSatwara/